

No. 83-1653

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SUPREME COURT OF THE UNITED STATES

October Term, 1983

SCRIPPS-HOWARD BROADCASTING COMPANY,

Petitioner,

v

EMBERS SUPPER CLUB, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

BRIEF FOR THE RESPONDENT

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May 10, 1984

QUESTION PRESENTED FOR REVIEW

- I. Whether, under the particular facts of this case, the plaintiff (a non-public figure) established all of the constitutionally required elements of a prima facie case of defamation so as to make erroneous the granting of the defense motion for a directed verdict at the close of the plaintiff's case-in-chief.

RULE 28.1 STATEMENT

Respondent, Embers Supper Club, Inc. is an Ohio Corporation and has no subsidiaries or affiliates, domestic or foreign, and is not in partnership with any other entity.

iii.

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BRIEF FOR THE RESPONDENT

OPINIONS

The opinions below are contained in the Petitioner's Appendices (Pet. App.) which are included in the Petition for Certiorari. To wit:

1. Judgment of the Supreme Court of the State of Ohio, filed January 11, 1984 (Pet. App. 18a);
2. Opinion of Supreme Court of the State of Ohio, reversing and remanding, filed January 11, 1984 (Pet. App. 1a-8a);
3. Opinion of the Court of Appeals, First Appellate

District of Ohio, filed October 20, 1982 (unpublished, Pet. App. 9a-15a) ;

4. Judgment Entry of the Court of Common Pleas, Hamilton County Ohio, filed July 30, 1981 (unpublished, Pet. App. 16a) .

JURISDICTION

The judgment of the Supreme Court of the State of Ohio, reversing the Court of Appeals and remanding for new trial was filed January 11, 1984. The petition for certiorari was filed April 10, 1984. The jurisdiction of the Supreme Court of the United States is invoked by the petitioner under 28 U.S.C. Section 1254 (1) .

CONSTITUTIONAL PROVISIONS INVOLVED

I. Constitution of the United States, First Amendment:

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

II. Constitution of the United States, Fourteenth Amendment, Section 1:

(N) or shall any state deprive any person of . . . liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

A. State of Procedure

The publications complained of were made by the petitioner on July 21, 1972, and July 23, 1972, during its 11:00 p.m. television newscasts. The complaint was filed August 17, 1972, and the issues were joined in the second amended complaint filed October 9, 1975, and the answer filed by leave, October 18, 1976. Following three separate motions for summary judgment and one interrupted trial, which was terminated in progress due to the physical inability of the trial judge to continue, the trial from which the petitioner takes this writ of certiorari, began on June 15, 1981 and concluded on June 19, 1981. At the close of the plaintiff's case-in-chief the trial court directed a verdict for the petitioner. Final judgment entry was entered on July 30, 1981. The matter was appealed to the Court of Appeals, First Appellate District of Ohio, which affirmed the decision of the trial court by an unpublished opinion filed October 20, 1982 (Pet. App. 9a).

Plaintiff-respondent, Embers Supper Club, Inc., filed its memorandum in support of jurisdiction to the Supreme Court of Ohio on January 19, 1983, which was allowed on March 2, 1983. The matter was thereafter briefed and argued. The Supreme Court of Ohio by opinion and entry of January 11, 1984, reversed the Court of Appeals and remanded the cause for a new trial.

The petitioner-defendant filed its writ of certiorari which was docketed in the Supreme Court of the United States on April 10, 1984.

B. Statement of Facts

Embers Supper Club, Inc., the plaintiff-respondent (hereinafter respondent) is an Ohio corporation and has non-public figure status in this action for defamation. During the period relevant to this suit, the respondent conducted the business of a supper club in Springdale, Ohio (R243-44). The respondent brought suit against petitioner on August 17, 1972 for defamation arising from two publications, one occurring on the WCPO-TV 11:00 newscast of July 21, 1972 and the other occurring on the WCPO-TV 11:00 p.m. newscast of July 23, 1972 (R100-01). The text of the July 21 and July 23 publications appear in the record (R) and the defendant has admitted both publications (R40-41, 102-03, 102).

The respondent's evidence demonstrated that both publications were false and defamatory. The false, defamatory thrust of the first publication is that Elmwood Place handbook operators (who had been published in the media and associated in the public mind with organized crime) had set up operations in the plaintiff's place of business. The false, defamatory thrust of the second publication is found in the nine word lead sentence which labels the plaintiff as a "local bookie".

The first publication charges that handbook operators from Elmwood Place had set up operations at the Embers. Respondent's evidence demonstrated that no bookmaking activities were conducted at the Embers and that no Elmwood Place gamblers had set up operations at the Embers (R305-09). Indeed, the evidence showed that no gambling operations of any type were being conducted on the premises (R305, 308-10, 284). There was no evidence to the contrary. Mr. Lummanick, a staff writer for petitioner, had no recollection as to how the reference to Elmwood

Place came to be in the first story (R50) and Mr. Schottelkotte, the news anchor man, confirmed that in the months preceding the publication there had been local media coverage concerning gambling and handbook operators in Elmwood Place and that by virtue of such coverage, gambling in Elmwood Place had been linked to organized crime (R112-14). Mr. Comer, sole shareholder of the Embers and its chief executive officer, also recalled the notoriety of Elmwood Place gamblers and recalled they had been recently tied to organized crime (R311-12).

The second publication charged the Embers with being an area bookie. Mr. Hughes, expert witness for the respondent, testified that the first nine words of the second publication "Business went sour for some of the area's bookies . . ." was a lead sentence for the entire story, including the portions referring to the Embers (R147). Messrs. Lumannick and Schottelkotte admitted the correctness of the expert's opinion (R56-59; 125-26).

Concerning damages, Mr. Comer testified that the Ember Supper Club suffered substantial special damages and great general damages as the result of the false, defamatory statements of the two publications (R313-14, 320-29, 331 *passim*, 353-358). Mr. Comer testified that the Embers lost revenue and customers following the two publications by the petitioner (R333-38).

The script for the first publication was written by Mr. Lummanick and subsequently published by Mr. Schottelkotte on the 11:00 news (R40). Mr. Lummanick does not recall how or if the script was verified before publication (R41). Mr. Schottelkotte admitted he had no knowledge of how or if the script for the first publication was verified, but further admitted that he did not verify it (R103, 128-29). Mr. Schottelkotte testified that he, personally, had

written the script for the second publication of July 23 (R123), based solely on the information contained in the first script (R127-28). Mr. Schottelkotte admitted that no investigation by the petitioner had been done between the first publication of July 21 and the second publication on July 23 (R127-28). Mr. Schottelkotte wrote and published the second script using only the information which appeared in the first script (R128-29). Mr. Lummanick, commenting upon the contents of the first script as having anything to do with the nine word lead sentence of the second script, admitted that the lead sentence of the second script was nothing more than "a product of the author's imagination" (R63). The respondent showed uncontrovertibly that the petitioner never bothered to obtain the true facts or ask for any comments at all from the Embers concerning the two false, defamatory publications (R222-24, 237-39, 310-11).

ARGUMENT

There is no dispute concerning the principles of law applicable to this case. Both parties recognize that the Constitution requires proof of some degree of fault, i.e. negligence. Rather, the only issue presented to the Supreme Court of Ohio and now to this Court is whether the facts proven below satisfy these standards. The issues are predominantly, if not exclusively, factual in nature.

The respondent has made a *prima facie* case of actionable defamation. The elements of the claim by a non-public figure such as the petitioner are that there is a false and defamatory publication, of and concerning the respondent, and made with some degree of fault, whether that degree of fault be negligence, express malice or actual malice. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Maloney v. E. W. Scripps*, 43 Ohio App. 2d 105, 33 N.E.2d 494 (1974)¹

A non-public figure plaintiff, in order to maintain a *prima facie* case of actionable defamation, must establish the threshold issue of liability by at least showing that the defendant negligently made a false and defamatory publication about the plaintiff. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

The first publication is false and defamatory in the material respects that the Springdale Police (who conducted

¹ These are minimal requirements in order to establish liability and allow the plaintiff to prove actual damages. If the plaintiff also is able to establish the higher degree of fault, actual malice, then general damages may be presumed and the plaintiff may also recover punitive damages. In this instance plaintiff presented evidence to support a charge to the jury regarding actual malice as well as the lesser charge of the negligence of the defendant.

a search of the Embers on July 21, 1972, the date of the first publication) did not state, nor did the affidavit given to obtain the search warrant state, nor did the affidavit containing the verbatim official Springdale Police report state that handbook operators from Elmwood Place had set up operations at the Embers. The second publication (July 23, 1972) is false and defamatory in the material respect that the nine word lead sentence makes the un-attributed and unqualified factual statement that the Embers is an area bookie. The second publication admittedly was based solely on the contents of the first publication with no attempt to verify the truth of the second story before it was published on July 23. The unqualified factual statement of the lead sentence in the second publication was shown by the respondent to be false, defamatory, and nothing more than the product of the author's imagination.

No constitutional privilege or protection is extended to the petitioner with respect to either of these false and defamatory publications.

(T) here is no constitutional value in false statement of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wideopen debate on public issues. *New York Times Co. v. Sullivan*, (citation omitted) They belong to that category of utterances which are no essential part of any exposition of ideas and are of such slight social value as a step to truth, and that any benefit that may be derived by them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942)

Gertz v. Welch, 418 U.S. 323, 340.

A false, defamatory statement made with some degree

of fault less than actual malice, may nevertheless, as petitioner contends, be a privileged publication and therefore make the publisher immune from liability. A privilege is granted by Ohio Revised Code Section 2317.05 to the publication of a fair and impartial report of the issuing of any warrant, the filing of any affidavit, or a fair and impartial report of the contents thereof unless it is proved that the publication was made maliciously. The statutory privilege is inapplicable here for several reasons. The July 21 false, defamatory statement regarding Elmwood Place gamblers, and the July 23 false, defamatory, unattributed and unqualified factual accusation concerning the Embers being a bookie, go beyond the content of the Springdale Police report (R153-56, 219-20) and therefore go beyond the statutory privilege. In addition, the respondent's expert testified that the publications were neither fair nor impartial, a conclusion supported by the facts. The petitioner made direct accusations of criminal activity in connection with organized crime but did not bother to obtain the true facts or any comment at all from the Embers (R222-24, 237-39, 310-11). In any event, the applicability or interpretation of this statute is not a matter of constitutional or federal law concern and therefore cannot support the petitioner.

From an examination of the record at the close of the respondent's case, it is apparent that the jury reasonably could have found the publications of July 21 and July 23 were false, defamatory, and made negligently. It is also apparent from the record that Mr. Comer, the sole shareholder of petitioner and its president and chief executive officer, was the person most familiar with the daily operations of the Embers, its expenses, cash flow and general business. The jury also reasonably could have found that the general and special damages to the business of the

Embers had been proved sufficiently to make an award to the respondent. *Marlie Trading, Inc. v. Biggs Boiler Work Co.*, 112 Ohio App. 428, 432; 116 N.E.2d 301 (1960).

With respect to the matter of actual malice and whether or not the plaintiff had made a *prima facie* showing of that higher degree of fault, the record was such that the court properly should have charged on the issue of actual malice. A jury receiving such a charge could have found either or both of the false, defamatory publications charging criminal conduct to be made "with reckless disregard whether it was false or not" *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964); or that the petitioner "in fact entertained serious doubt as to the truth of whether or not" the Embers was a bookie joint run by Elmwood Place handbook operators who were connected with organized crime, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); or that the petitioner had a "subjective awareness of probable falsity" of the criminal accusations made in its publications, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 (1974); or that the petitioner had "reason to suspect that its damaging publication was in error", *Herbert v. Lando*, 441 U.S. 153, 160 (1974).

Had the jury made such a finding of actual malice, respondent was entitled to a presumption of general damages. Where it is determined that a false and defamatory statement is published with actual malice, special damages need not be proved in order to award both general and punitive damages. The question of actual malice, on the state of the record, was one for the jury, which reasonably could have concluded that the statements were false, defamatory, and published with actual malice.

CONCLUSION

The petitioner has meandered through the facts of this matter in an unsuccessful attempt to make a constitutional argument. Undisguised, the attempt of petitioner is simply to reargue facts already determined sufficient to meet the constitutional requirements establishing a *prima facie* case of actionable defamation brought by a non-public figure. There is no proper basis for review by this Court and it is therefore, respectfully suggested that petitioners' request for a Writ of Certiorari be denied.

Respectfully submitted,

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Appendix A

§ 2317.05 Impartial report of indictment, warrant, affidavit, or arrest privileged. (GC § 11343-2)

The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document in any criminal or civil cause in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged, unless it is proved that the same was published maliciously, or that defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such suit or action. This section and section 2317.04 of the Revised Code do not authorize the publication of blasphemous or indecent matter.

HISTORY: GC § 11343-2; 102 v 95. Eff 10-1-53.